



**FEDERAL ELECTION COMMISSION**  
WASHINGTON, D.C. 20463

**FEB 08 2005**

**Via Certified Mail, Return Receipt Requested**

Jody Novacek, Registered Agent  
BPO, Inc. and BPO Advantage, LP  
1221 Lakewidge Lane  
Irving, Texas 75063

**RE: MUR 5472**

**Dear Ms. Novacek:**

On January 31, 2005, the Federal Election Commission found that there is reason to believe BPO, Inc. and BPO Advantage, LP (collectively, "BPO entities"), knowingly and willfully violated 2 U.S.C. § 441h(b)(2), provision of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 28 days.

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If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have enclosed a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Alexandra Doumas, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas  
Chairman

Enclosures  
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION**  
**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENT: BPO, Inc. MUR: 5472**  
**BPO Advantage, LP**

**I. GENERATION OF THE MATTER**

This matter was generated by a complaint filed with the Federal Election Commission by Jill Holtzman Vogel, Chief Counsel, Republican National Committee. See 2 U.S.C. § 437g(a)(1).

**II. BACKGROUND**

In 2004, the Republican Victory Committee, Inc. ("the Committee") was formed and incorporated in Texas. BPO, Inc., BPO Advantage, LP, the Committee, and Jody Novacek embarked upon a strategy to solicit contributions and donations by making fundraising calls through telephone banks and by following up on those phone calls with direct mailings.

BPO, Inc. is a company owned and operated by Jody Novacek. BPO Advantage, LP is a marketing and consulting company also owned by Jody Novacek and listed as an affiliate of BPO, Inc.<sup>1</sup> According to press reports, Mr. Novacek hired one of the BPO entities to manage the Committee's fundraising and pay the Committee's telemarketing bills. The BPO entity, in turn, hired Apex to conduct the telemarketing calls. It is unknown at this time which entity (BPO, Inc. or BPO Advantage, LP) paid Apex or

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<sup>1</sup> Collectively, BPO, Inc. and BPO Advantage, LP will be referred to as "the BPO entities."

1 conducted business with Apex, but it appears that the companies are virtually  
2 interchangeable: Dun and Bradstreet lists the companies as affiliated entities; they are  
3 both run by Jody Novacek; and they both operate out of Ms. Novacek's home. It is also  
4 unknown at this time whether either BPO entity benefited financially from its  
5 arrangement with the Committee.

6 Ms. Novacek and the Committee clearly did business and were familiar with the  
7 BPO entities. In fact, it appears that Ms. Novacek was a representative of the BPO  
8 entities: Ms. Novacek is the only representative referenced in the BPO entities' Dun and  
9 Bradstreet reports, and their addresses and telephone numbers are the same as Ms.  
10 Novacek's home (which is the same address and telephone number as the Committee).  
11 Based on all of those factors, Ms. Novacek's knowledge should be imputed to the BPO  
12 entities.

### 13 **III. FACTUAL AND LEGAL ANALYSIS**

14 The solicitation calls conducted by the BPO entities on behalf of the Committee  
15 appear to have fraudulently misrepresented the Committee as affiliated with the  
16 Republican Party. The Act, as amended by BCRA, states that no "person" shall:

- 17 (1) fraudulently misrepresent the person as speaking, writing, or otherwise  
18 acting for or on behalf of any candidate or political party or employee or  
19 agent thereof for the purpose of soliciting contributions or donations; or  
20 (2) willfully and knowingly participate in or conspire to participate in any  
21 plan, scheme, or design to violate paragraph (1).

22  
23 2 U.S.C. § 441h(b). To violate section 441h, the Act requires that the violator had the  
24 intent to deceive, but does not require that the violator sustain all elements of common

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1 law fraud. See MUR 3690; MUR 3700.<sup>2</sup> "Unlike common law fraudulent  
2 misrepresentation, section 441h gives rise to no tort action..." and therefore proof of  
3 justifiable reliance and damages is not necessary. See Explanation and Justification,  
4 11 C.F.R. § 110.16, 67 Fed. Reg. 76,969 (Dec. 31, 2002); *Neder v. United States*, 527  
5 U.S. 1, 24-25 (1999) (citing *United States v. Stewart*, 872 F.2d 957, 960 (10<sup>th</sup> Cir. 1989)).  
6 The BCRA amendments were enacted in response to concerns that the prior version of  
7 the statute did not permit the Commission to take action against persons not associated  
8 with a candidate or a candidate's authorized committee. The amendment was necessary  
9 because contributors often were solicited for money and believed their contributions and  
10 donations were benefiting a specific candidate, only to learn later that the funds were  
11 diverted to another purpose. The harm was therefore both to the candidate and the  
12 contributor. See Explanation and Justification, 11 C.F.R. § 110.16, 67 Fed. Reg. 76,969  
13 (Dec. 31, 2002). Courts have held that even absent an express misrepresentation, a  
14 scheme devised with the intent to defraud is still fraud if it was reasonably calculated to  
15 deceive persons of ordinary prudence and comprehension. See *United States v. Thomas*,  
16 377 F.3d 232, 242 (2d Cir. 2004), citing *Silverman v. United States*, 213 F.2d 455 (5<sup>th</sup>  
17 Cir. 1954).

18 In contravention of 2 U.S.C. § 441h(2), the BPO entities participated in a scheme  
19 with the Committee and Ms. Novacek to violate 2 U.S.C. § 441h(1). Subsection 2  
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<sup>2</sup> In the past, the Commission has held on occasion that the presence of a disclaimer stating the person and/or entity that paid for and authorized a communication negates intent. See MUR 2205; MUR 3690; MUR 3700. The Committee did place a disclaimer on its mailing. However, in MUR 5089, the Commission more recently rejected the notion that such a disclaimer automatically negates intent and found reason to believe that a committee violated section 441h even with the presence of a disclaimer.

1 requires that violations of 2 U.S.C. § 441h(b)(1) be knowing and willful.<sup>3</sup> The phrase  
2 knowing and willful indicates that "actions [were] taken with full knowledge of all of the  
3 facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H 2778  
4 (daily ed. May 3, 1976); *see also Federal Election Comm'n v. John A. Dramesi for Cong.*  
5 *Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986) (distinguishing between "knowing" and  
6 "knowing and willful"). A knowing and willful violation may be established "by proof  
7 that the defendant acted deliberately and with knowledge" that an action was unlawful.  
8 *United States v. Hopkins*, 916 F.2d 207, 214 (5<sup>th</sup> Cir. 1990). In *Hopkins*, the court found  
9 that an inference of a knowing and willful violation could be drawn "from the  
10 defendants' elaborate scheme for disguising their ... political contributions..." *Id.* at  
11 214-15. The court also found that the evidence did not have to show that a defendant  
12 "had specific knowledge of the regulations" or "conclusively demonstrate" a defendant's  
13 state of mind," if there were "facts and circumstances from which the jury reasonably  
14 could infer that [the defendant] knew her conduct was unauthorized and illegal." *Id.* at  
15 213 (quoting *United States v. Bordelon*, 871 F.2d 491, 494 (5<sup>th</sup> Cir.), *cert. denied*, 439  
16 U.S. 838 (1989)). Finally, "[i]t has long been recognized that 'efforts at concealment  
17 [may] be reasonably explainable only in terms of motivation to evade' lawful  
18 obligations." *Id.* at 214 (quoting *Ingram v. United States*, 360 U.S. 672, 679 (1959)).

19 The telephone call solicitations made by the BPO entities would have led a  
20 reasonable person to believe that the Committee was acting on behalf of the Republican  
21 Party. In the telephone call solicitations, the callers appear to have been instructed to

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<sup>3</sup> Section 441h(b)(2) requires that a respondent "willfully and knowingly" participate in, or conspire to participate in, a plan, scheme or design to engage in fraudulent solicitation. Thus, "knowing and willful" is an element of the statute rather than a separate basis for increased civil and criminal liability under 2 U.S.C. § 437g(d)(1)(C).

1 speak only with registered Republicans. Once they were certain they were speaking with  
2 a registered Republican, the callers asked for support for "our state candidates and  
3 President Bush's agenda" because "[i]t's going to be tough to beat the Democrats this  
4 fall." The caller explained, "Your financial help is critical so Republicans can win...."  
5 The callers never stated that they were not affiliated with the Republican Party, but their  
6 statements would have led a reasonable person to believe that they were so affiliated.

7 If a recipient expressed confusion during the call, the caller was directed to use a  
8 series of "rebuttals," drafted in advance by the Committee and Jody Novanok. The  
9 rebuttals set forth answers to possible questions by call recipients, such as questions  
10 regarding for what purpose the money would be used; questions asking who and what the  
11 committee was; or statements expressing unhappiness with President Bush or the war in  
12 Iraq. However, only if the recipient of the call explicitly articulated some hesitation or  
13 confusion similar to the questions set forth above did the caller explain who or what the  
14 Committee was; indicate in even an indirect way that the Committee was not affiliated  
15 with the Republican Party, the Republican National Committee or President Bush; or  
16 indicate for what purpose the donated money would be used.

17 The Commission previously has made knowing and willful and probable cause  
18 findings against a committee and individuals that violated 2 U.S.C. § 441h. In MUR  
19 4919 (East Bay Democrats),<sup>4</sup> the Commission found probable cause to believe a violation  
20 of section 441h occurred when a committee's campaign materials provided misleading  
21 information to potential contributors. In that case, a Republican committee created a  
22 fictitious committee using the word "Democratic" in the name of the committee and  
23 mailed campaign materials to registered Democrats, requesting that they not vote for the

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<sup>4</sup> Although a pre-BCRA case, the analysis in MUR 4919 should be applied to the current case.

1 Democratic candidate. The mailing alleged that the Democratic candidate abandoned  
2 "our party," implying that the sponsor of the mailing was affiliated with the Democratic  
3 Party. The mailing also used the name of a local Democratic leader as the signator.  
4 Finally, the letter conveyed actual Democratic Party views, in an attempt to make the  
5 communications appear that they were legitimate communications of a local committee  
6 of the Democratic Party.

7 In this case, the scripts produced by the Committee and Ms. Novacek, and  
8 executed by the BPO entities, provide for rebuttals and more detailed and descriptive  
9 explanations of the Committee (for example, stating it was not affiliated with or working  
10 on behalf of the Republican Party or the Bush-Cheney campaign) -- but only if the  
11 recipient of the call specifically asked the question. Furthermore, the fact that these  
12 descriptions had already been drafted and incorporated into the call script demonstrates  
13 the knowledge that the phone calls likely would be confusing to the intended recipients,  
14 and yet all failed affirmatively to address this potential confusion.

15 Therefore, from the evidence available at this time, it appears that the BPO  
16 entities knowingly and willfully participated in a scheme or plan with Ms. Novacek and  
17 the Committee to execute the telephone call script. Accordingly, based on the foregoing  
18 information, the Commission found reason to believe that BPO, Inc. and BPO  
19 Advantage, LP knowingly and willfully violated 2 U.S.C. § 441h(b)(2).

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